

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Service Rules for the 746-764 and 776-794)	
MHz Bands, and Revisions to Part 27 of the)	WT Docket No. 99-168
Commission's Rules)	
)	
Carriage of the Transmissions of Digital)	
Television Broadcast Stations)	CS Docket No. <u>98-120</u>
)	
Review of the Commission's Rules and)	
Policies Affecting the Conversion to Digital)	MM Docket No. 00-39
Television)	

TO: The Commission

**REPLY COMMENTS OF THE ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.**

The Association for Maximum Service Television, Inc. ("MSTV")¹ files these replies to comments to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned matter ("*Further Notice*").² In the *Further Notice*, the Commission sought comment on whether it should adopt cost-sharing rules or leave such arrangements to private negotiations among concerned parties; on voluntary three-way relocation agreements between new licensees,

¹ MSTV represents nearly 425 local television stations on technical issues relating to analog and digital television services. It played a central role in developing the methodology for allotting and assigning digital television channels and has worked intensively and consistently for a rational reallocation of television channels 60-69.

² *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules. Carriage of the Transmissions of Digital Television Broadcast Stations, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-224, WT Docket No. 99-168, CS Docket No. 98-120, MM Docket No. 00-83 (adopted June 22, 2000). The Memorandum Opinion and Order portion will be referred to as the "*Memorandum Opinion and Order*."

incumbent broadcasters on Channels 60-69, and broadcasters on lower channels; and on the feasibility of secondary auctions.³

The Commission received comments from both broadcasters and representatives of the wireless industry. Notwithstanding their diverse interests, almost all of these commenters shared the position that the Commission's role should (and, in some cases, must be) restricted to approving voluntary agreements that facilitate clearing of the 700 MHz band. Moreover, broadcasters were not alone in urging the Commission to adopt the rules that are still missing to complete the Commission's work on DTV and foster a speedy DTV transition.⁴ MSTV in these reply comments strongly urges the Commission to adopt a Report and Order in which it confirms that only truly voluntary three-way agreements and secondary auctions are permitted to clear the 700 MHz band before the end of the DTV transition and that no "involuntary" additional interference will be permitted to any broadcast station. The Commission should also recognize that the only way to clear the 700 MHz band effectively is swiftly to adopt measures that promote delivery of DTV to the entire public through reasonable digital cable carriage rules, aggressive interoperability rules and deadlines, and rational and effective DTV license processing and channel election procedures. By taking these measures, and these measures alone, the Commission will accelerate the date by which all broadcasters give up their analog channels and by which incumbents in Channels 60 to 69 would be willing to operate as DTV-only stations on lower paired lower channels, thereby making the 700 MHz band more fully available to new licensees.

³ See *Memorandum Opinion and Order* ¶ 2.

⁴ See, e.g., Comments of Spectrum Exchange Group, LLC at 10 (arguing that giving broadcasters full digital must carry rights would facilitate band-clearing) ("Spectrum Exchange Comments").

I. The Commission Lacks Authority To Mandate Clearing of the 700 MHz Band.

As MSTV explained in its initial comments, and as nearly every commenter in this proceeding agrees, the Commission cannot mandate clearing of the 700 MHz band prior to the end of the DTV transition.⁵ Instead, the Commission has authority to approve only truly voluntary three-way agreements and secondary auctions.⁶

A. The 700 MHz Auction Shares Little With The Commission's *Emerging Technologies* Precedent.

Some commenters from the wireless industry rely on the Commission's earlier *Emerging Technologies* docket, in which it addressed band-clearing issues relating to the auction of PCS and microwave spectrum, to argue that the Commission may do more than merely approve voluntary agreements to clear the 700 MHz band.⁷ As the Commission surely recognizes, moving broadcaster incumbents years before there is spectrum available for their relocation and during a time when Congress expressly stated that they ought not to be forcibly relocated, is entirely different from the *Emerging Technologies* precedent. In that proceeding, Congress required incumbent broadcasters to vacate their existing spectrum.⁸ This is not an appropriate

⁵ See Comments of the Association for Maximum Service Television, Inc. at 4-7 ("MSTV Comments"); see also Comments of Entravision Holdings, LLC at 2; Comments of the National Association of Broadcasters at 4 ("NAB Comments"); Comments of Nextel Communications, Inc. at 3 ("It is evident that the Commission is unable at this time to mandate any incumbent broadcaster participation in early 700 MHz relocation efforts.") ("Nextel Comments"); Comments of Paxson Communications Corp. at 23 ("Paxson Comments"); Comments of Sonshine Family Television, Inc. at 5 ("SFTI Comments").

⁶ See Entravision Comments at 2; MSTV Comments at 10; NAB Comments at 4; Paxson Comments at 23; SFTI Comments at 2; Comments of Shop At Home, Inc. at 6 ("Shop At Home Comments"); Comments of Sinclair Broadcast Group, Inc. at 6 ("Sinclair Comments"); Comments of USA Broadcasting, Inc. at 8-9 ("USA Comments").

⁷ See, e.g., Joint Comments of the Industrial Telecommunications Ass'n, Inc. and Access Spectrum LLC at 3-4; Comments of Verizon Wireless at 2-3 ("Verizon Comments").

⁸ See Pub. L. No. 103-66, § 6001(a) (1993), 107 Stat. 312, 383 (codified at 47 U.S.C. § 923(e)(2)).

analogy to the 700 MHz band, where Congress has instructed that new entrants not interfere with incumbent broadcasters until the end of the DTV transition.⁹

In addition, the *Emerging Technologies* precedent involved moving incumbents to replacement spectrum, allowing for a wholesale clearing of spectrum for new licensees without disrupting the provision of existing services. However, there is no replacement spectrum to which incumbent broadcasters in the 700 MHz band may relocate. When the Commission crafted the DTV Table of Allotments, it packed stations tightly into channels 2-51 to free up as much spectrum as possible for pre-transition reallocation. It minimized as much as possible “the use of channels 60-69 to facilitate early recovery of this portion of the spectrum”¹⁰ and assigned these channels only in the most severely spectrum-congested regions of the country. The Commission explained that “[h]ad other channels been available, they would have been allotted to these broadcasters.”¹¹ The reason it could not come up with alternate channel assignments for these broadcasters is because none were available, and this remains the case today. Thus, even if the Commission were to consider requiring broadcasters to leave the 700 MHz band early or Congress were to pass legislation allowing it to do so, realistically there is nowhere for these broadcasters to move at this time without severe service penalties that would deprive viewers in many cases of a sole-service network affiliate, public, or independent station.

⁹ See Communications Act of 1934, § 309(j)(14)(A) (codified as amended at 47 U.S.C. § 309(j)(14)(A)).

¹⁰ *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14626 (1997).

¹¹ *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd 6860, 6892 (1998).

Nextel, a wireless licensee with much to gain from the relocation of 700 MHz band broadcasters, reached the same conclusion about the distinction between heavy Commission involvement in the *Emerging Technologies* context and light involvement with respect to voluntary 700 MHz relocations. Nextel, which “has extensive experience in negotiating relocation of incumbent operators under frameworks that have regulatory deadlines and mandatory aspects, as well as negotiating relocation outside of any framework but the marketplace,”¹² explained that:

given the relatively small number of affected broadcasters and 700 MHz auction winners, post-auction negotiations among incumbent broadcasters, auction winners and, potentially, broadcasters lower in the band will likely produce voluntary omnibus agreements and voluntary cost-sharing arrangements. Thus, rather than expend time and resources to implement rules that will have little effect on the band-clearing process, the Commission should adopt a workable agenda that will govern incumbent relocation *at the time relocation becomes mandatory*. Such a framework would assist all parties by notifying them of the rules of the road at the stage where mandatory relocation can occur.¹³

Nextel puts its finger on the essential distinctions between the *Emerging Technologies* and 700 MHz proceedings: broadcasters are not required to relocate from the 700 MHz band before the end of the DTV transition, and there is no replacement spectrum or a revised channel plan to make mass relocation possible without the loss to the viewing public of a tremendous amount of service. The Commission may only encourage broadcasters to relocate by taking actions that will facilitate the DTV transition.

B. The Commission Lacks Authority to Adopt A Lone Holdout Rule.

In the *Further Notice*, the Commission requested comment about the use of secondary auctions, such as the one proposed by Spectrum Exchange, as a mechanism for clearing the 700

¹² Nextel Comments at 2.

¹³ *Id.* at 3-4 (emphasis added) (footnote omitted).

MHz band.¹⁴ In response, Verizon argues that for such a procedure to be effective, the Commission should adopt a “lone holdout” rule, whereby a single incumbent broadcaster who opts not to vacate its spectrum before the end of the transition would be forced by the Commission to relocate.¹⁵ Contrary to Verizon’s assertions, there is *not* “ample authority for the Commission to adopt” such a rule.¹⁶ As Paxson explains, “the FCC cannot impose a mandatory relocation of television stations to circumvent efforts of a ‘hold-out’ broadcaster to continue serving viewers as Congress intended.”¹⁷ Congress has never given the Commission authority to effect mandatory termination of the services of incumbent broadcasters in the 700 MHz band, and the Commission cannot force their participation in a secondary auction either directly or by adopting a “lone holdout” rule.

II. The Commission Must Make Clear That Any Voluntary Relocation Agreements Cannot Result In Even *De Minimis* Increased Interference To Non-Participating Broadcast Stations On Lower Channels.

As MSTV argued in its initial comments, and as others agree, voluntary relocation agreements cannot cause *any* increased interference to non-participating broadcast stations on Channels 2-59.¹⁸ The Commission must remain alert to the fact that broadcast channel allotments are not fungible and that in most cases, analog operations cannot be squeezed into a

¹⁴ See *Further Notice* ¶¶ 93-95.

¹⁵ See Verizon Comments at 4-5.

¹⁶ *Id.* at 4.

¹⁷ Paxson Comments at 23.

¹⁸ See MSTV Comments at 14-15; see also Comments of Midwest Television, Inc. at 2 (“We strongly object, however, to *any* band-clearing mechanisms that would result in *any increased interference to the analog or digital operations of other full power television stations*. Without proper Commission safeguards, voluntary three-way agreements and other band-clearing mechanisms pose a real and dangerous threat to the public’s television service in the most spectrum-congested regions of the country.”) (footnote omitted) (“Midwest Comments”).

channel assigned for digital services without causing tremendous disruption and loss of service and without requiring major expensive changes to broadcast station facilities.¹⁹

The Commission carefully crafted the DTV Table so as to minimize interference to existing broadcast service and maximize new DTV service. Especially in spectrum-congested regions of the country such as southern California and the Northeast, the Commission performed a delicate balancing act, weighing and evaluating numerous concerns in order to replicate stations' service areas as closely as possible. To allow incumbent Channel 60 to 69 broadcasters relocating to a lower channel to upset this balance by causing increased interference to lower channel facilities would go against years of careful planning that were recently upheld by the D.C. Circuit Court of Appeals. Real people who rely on certain television stations would be deprived not only of DTV service they have yet to see, but also of analog service that would suddenly go dark. The Commission must stand firm on the principle that under no circumstances will increased interference, even so called *de minimis* interference, be tolerated.²⁰ Broadcast stations on Channels 2-59, and the public they serve, should not be penalized by the deals struck to clear the 700 MHz band.

¹⁹ As we stated in initial comments, the DTV Table assigned each channel to a specific licensee because that was the channel that could replicate that licensee's analog coverage given the existing transmitter site, service area, and perhaps even analog channel number. The analog licensee operating on Channels 60 to 69, by contrast, might be operating at an entirely different site, with a very differently-shaped service area, and, obviously, operating on a different analog channel. Moreover, the operation of analog, rather than digital, signals on a lower channel might make it entirely unusable (since analog operations cause more interference and are more vulnerable to interference than are digital operations). See MSTV Comments at 12-14; see also Midwest Comments at 6; NAB Comments at 6-7; USA Comments at 10.

²⁰ See Midwest Comments at 6 ("If the Commission allows allotment modifications to accommodate band-clearing arrangements that further increase interference levels in these regions or put additional strains on *de minimis* allowances, the public will suffer – through increased interference levels and analog and digital service losses.").

In its comments, Paxson contemplates that service losses caused by a Channel 60 to 69 broadcaster relocating to a lower channel would be tolerable, “so long as the community receives Grade B service from three other television stations.”²¹ Paxson’s position with respect to loss of service is untenable, and the Commission should reject it outright. The Commission cannot allow channel relocations to compromise the public’s free, over-the-air television service. Each local broadcast station adds a voice to its community and fills a particular niche there, especially for the 30 percent of non-cable homes in the country and the many millions of cable homes where significant amounts of television viewing takes place on over-the-air sets.²² It would be odd indeed for the Commission to accept the loss of broadcast television voices for this significant a portion of the viewing public when the Commission has striven to preserve a multitude of voices in its broadcast ownership rules.

III. The Commission Should Not Further Delay The Auction Of Spectrum In The 700 MHz Band.

The Commission has delayed the auction of spectrum in the 700 MHz band, which is currently scheduled for March 6, 2001, three times. These continued delays in the auction date result in damaging uncertainty to some of those considering bidding on the new licenses and to incumbent broadcasters. MSTV agrees with those unopposed commenters who urge no further delays in the auction of this spectrum.²³ Congress required that the auction occur before

²¹ Paxson Comments at 31.

²² *Cf. id.* at 30 (noting that the availability of MVPDs such as cable and DBS “will mitigate the loss of over-the-air analog service”).

²³ *Id.* at 16 (“Further delays, however, especially in light of statutory directives, are neither wise nor warranted.”); Shop At Home Comments at 8; USA Comments at 12; Spectrum Exchange Comments at 10.

September 30, 2000, and this deadline clearly will not be met.²⁴ Any further delays will only create more uncertainty for bidders and broadcasters alike.²⁵

IV. The Commission Must Act Now To Facilitate The DTV Transition, Which Is The Most Effective Way To Clear The 700 MHz Band.

As MSTV and virtually every other broadcaster explained in initial comments, the most effective way the Commission can encourage clearing of the 700 MHz band is by facilitating the DTV transition. The Commission can and should do this by taking two courses of action. First, the Commission should immediately adopt digital carriage rules in combination with standards for interoperability and compatibility. Second, the Commission must make clear that a Channel 60-69 incumbent who vacates its analog allotment to broadcast solely on its digital channel is entitled to mandatory carriage of its digital-only signal.

A number of commenters urge the Commission to encourage band-clearing by swiftly adopting DTV must-carry rules.²⁶ As MSTV has explained on countless prior occasions, DTV must-carry rules are essential to the success of the DTV transition and to the fastest possible clearing of broadcast spectrum. But must-carry is only a piece of the still-unfinished puzzle. Other rules governing cable carriage of DTV signals need to be adopted including rules concerning signal degradation and electronic program guides. In addition, the DTV transition is

²⁴ See Pub. L. No. 106-113 (1999), 113 Stat. 1501, 1501 A-295, Appendix E, Section 213(a)(3).

²⁵ See Spectrum Exchange Comments at 10 ("The March date gives the FCC, the bidders, and the incumbent broadcasters ample time to establish procedures and resolve uncertainties in the 700 MHz band.").

²⁶ See Comments of Marantha Broadcasting Co. at 5; NAB Comments at 9; Paxson Comments at 36 ("After putting off releasing a Report and Order in the two year-old must carry proceeding, the FCC has thwarted the intent of Congress and crippled the DTV transition.") (footnote omitted); SFTI Comments at 9; USA Comments at 3; *see also* Sinclair Comments at 3 (explaining that depending on band-clearing proposals that rely on digital-only service by broadcasters for the duration of the transition are unlikely to be effective because broadcasters will lose too much of their audience share).

unlikely to gain momentum until there is a clear path towards digital interoperability that ensures the full functionality and ease of use of digital devices – a path that is unlikely to emerge from the Commission's upcoming order in its limited compatibility proceeding.²⁷

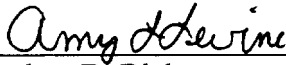
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For the foregoing reasons, MSTV urges the Commission to take appropriate steps to speed the DTV transition so that the 700 MHz band can be used more effectively by new entrants. To the extent that the Commission allows or facilitates voluntary agreements to relocate incumbent broadcasters from the 700 MHz band, it should not allow any new interference to or loss of service from non-participating broadcast stations. It should also ensure that any new relocation arrangements are first subject to effective notice and comment procedures. Finally, the Commission should not further delay the auction of this spectrum.

Respectfully submitted,

**THE ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.**

Victor Tawil
Senior Vice President
THE ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.
1776 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 861-0344


Jonathan D. Blake
Ellen P. Goodman
Amy L. Levine
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, D.C. 20044
(202) 662-6000

Its Attorneys

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²⁷ See *In re Compatibility Between Cable Systems and Consumer Electronics Equipment, Notice of Proposed Rulemaking*, PP Docket No. 00-67 (rel. Apr. 24, 2000); see also *Ex Parte* Notification of NAB and MSTV in PP Docket No. 00-67 and CS Docket No. 97-80 (Sept. 7, 2000); *Ex Parte* Notification of NAB and MSTV in PP Docket No. 00-67 and CS Docket No. 97-80 (Sept. 6, 2000).